No. 3585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN TRADING COMPANY
(a corporation),
Plaintiff in Error,

vs.

A. T. STEELE,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Inasmuch as counsel has adopted throughout his brief the use of the word "defendant" in referring to the plaintiff in error and the use of the word "plaintiff" in referring to the defendant in error, we shall, for the sake of clarity and consistency, likewise adopt these terms throughout our brief. We shall not at this point set forth at length the facts in the case. From pages one to five counsel has set for a resumé of these facts, and while this resumé contains certain conclusions of law, which will be at other points in this brief referred to, it is in the main a satisfactory statement of most of the facts in the case and we shall supplement it

from time to time with the facts upon which we particularly wish to dwell.

As we understand the brief for defendant, it raises six matters wherein it is alleged that the trial court was in error, and by reason of each of which it is claimed that the judgment of said trial court should be reversed. The propositions attempted to be made, as we understand them, are as follows:

1. That the defendant did not breach its contract with the plaintiff because it was authorized to discharge him whenever it considered his services unsatisfactory.

2. That by failing to deny in his replication that the services rendered by plaintiff were actually satisfactory and efficient, plaintiff must be deemed to have admitted that these services were both unsatisfactory and inefficient.

3. That the court erred in reserving certain rulings on objections to the admissibility of evidence.

4. That the decision of the arbitrator in the case was binding.

5. That the court erred with regard to the measure of damages.

6. That the sum of $507 Mex. should be deducted from the amount of the judgment.

We shall take up these propositions in the order in which we have numbered them above, and dispose of each of them in turn.

We have also added to our brief an additional section, to wit, Section VII, which deals with our contention that this appeal should be dismissed for the reason that no motion for a new trial was made in the court below. We are filing, in addition to raising this defense in Section VII of this brief, a motion for the dismissal of this appeal. Authorities set forth in Section VII of this brief are to be deemed to be in support of said motion.

I.

THE DEFENDANT WAS NOT JUSTIFIED IN DECLARING ITS CONTRACT WITH PLAINTIFF TERMINATED BY REASON OF THE CLAIM THAT HIS SERVICES WERE NOT PERFORMED IN AN EFFICIENT AND SATISFACTORY WAY.

1. The services of plaintiff, performed at Tokio, were not performed under a contract requiring them to be satisfactory.

The original contract entered into between plaintiff and the American Trading Company (Pacific Coast) was as follows:

"San Francisco, Cal.
May 27, 1918.

Mr. A. Tilton Steele,
Present.

Dear Sir:

Confirming the writer's conversations with you during the past few days, we have employed you as follows:

Position: Chief Accountant of our Shanghai office, the duties of which office you are to take

up as quickly as possible, proceeding herefrom for Shanghai within about thirty days.

Duration of Employment: Three years from July 1st next or earlier if the time of your departure from San Francisco for Shanghai hereunder be earlier. Should you not leave San Francisco for Shanghai hereunder prior to July 1st, next, your salary will commence on July 1st.

Compensation: Two Hundred and Fifty ($250.00) Dollars U. S. Gold per month for the first year and for the second and third year adjustments of salary to be made at the end of the first and second year, as may be mutually agreed; your compensation, however, not to be less than Ten Thousand ($10,000.00) Dollars for the entire period of three (3) years.

Satisfactory Service: The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way.

Transportation to Shanghai: In addition to salary as herein provided, we will provide you with first-class transportation to Shanghai.

Bond: It is a condition of your employment that you give any bond the Company may require, the Company paying the premium thereon.

Yours truly,
AMERICAN TRADING COMPANY.
(Pacific Coast.)
(Sgd.) Louis A. Ward,
Vice-President and Manager."

Upon August 27, 1918, plaintiff's journey from San Francisco to Shanghai having been interrupted at the request of the Tokio office, the following agreement was entered into between the American Trading Company and plaintiff:

"Tokyo, Aug. 27, 1918.

A. Tilton Steele, Esq.,
Present:

Dear Sir:

We beg to confirm our conversation of yesterday's date with reference to your temporary employment in this office.

Compensation: The compensation provided for in your original contract made with Mr. L. A. Ward, Vice-President and Manager of the American Trading Company of the Pacific Coast on May 27th calls for a salary of $250.00 Gold per month, or a salary of not less than $10,000.00 Gold for the three years' period of your contract. We have arranged that you are to receive $250.00 Gold at exchange 50, which is the equivalent of Yen 500.00 per month together with an additional allowance of Yen 150.00 per month to cover any additional expenses which you may be put to owing to the change in your plans. The two items above mentioned will make a total of Yen 650.00 per month which you will receive while you are in the employ of our Tokyo office.

Term of Employment: As explained to you, we wish you to remain in Tokyo during the time that Mr. Boyd is absent on holiday which we estimate will be about six months. This time will, of course, apply on your three years' term as mentioned in your original contract.

Travelling Expenses: Any legitimate travelling expenses incurred by you on behalf of the company will be refunded to you.

General: It is understood between us that this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco.

We remain, Dear Sir,

Yours very truly,

AMERICAN TRADING COMPANY.

(Sgd.) D. H. Blake,

Vice-President."

DHB-Q.

Inasmuch as the question of defendant's right to discharge the plaintiff in this case without other reason than the alleged unsatisfactoriness of his services, is one of the chief questions at issue upon this appeal, and inasmuch as there is no reference in the letter of August 27, 1918, to the satisfactoriness of any service, counsel strives to make it appear that this letter of August 27, 1918, is a mere modification of the original contract of May 27, 1918.

We do not believe that such is the legal effect of the letter of August 27, 1918. Instead of being a mere modification, it is an entirely separate and distinct agreement, standing wholly by itself and containing in itself all the terms necessary for its performance. We do not mean by such a construction to intimate that the letter of May 27, 1918, was in any way vitiated, or that the agreement contained in it was terminated by the letter of August 27th. The only effect of the later agreement upon the earlier one was to postpone the time when performance of the earlier one was to begin, without at the same time setting forward the time at which it was to terminate.

In support of such a construction we have the following circumstances: The agreement of May 27, 1918, is made between Mr. Steele and the American Trading Company (Pacific Coast), a corporation organized under the laws of the State of Maine. By it, plaintiff was bound to proceed at once to Shanghai, and there, for a period of three years, at

a monthly salary of $250, and a total salary of $10,000, fill the post of chief accountant, the service which he should render being "conditioned upon his doing his work in an efficient and satisfactory way". His transportation was to be paid to Shanghai, and he was to give a bond to the company.

The agreement of August 27, 1918, differs therefrom in almost every respect. It is an agreement entered into between the same Mr. Steele, but signed by a different corporation from the American Trading Company (Pacific Coast), to wit: the American Trading Company, a Virginia corporation. While it is true that these two corporations represent the same general international business enterprise, they were entirely distinct legal entities. Under this second agreement, Mr. Steele was employed at the Tokio office of the American Trading Company at a salary of 150 yen more than the $250 Gold which he was to have received under the agreement of May 27, 1918. The term of the employment was an indefinite period which was estimated as being in the neighborhood of six months and which was to be terminated upon the return of Mr. Boyd from his vacation. He was allowed any legitimate traveling expenses, and a general clause was added stating, "this temporary arrangement does not prejudice any verbal understanding which you may have had with Mr. Ward or with Mr. Burns prior to your departure from San Francisco." It will thus be seen that the two agreements differ as to the parties signing the contract with Mr. Steele, the

compensation to be received by him, the place at which performance was to be made, the duration of the employment, and the fact that from the second agreement all reference both to satisfactoriness of service and to bond is omitted. We submit that the result of the making of the agreement of August 27, 1918, was not, as is contended by counsel, the entering into a mere amendment to the original agreement, but the making of a partial novation whereby plaintiff made a wholly new agreement signed by another party with the knowledge and with the tacit agreement of the party signing the original agreement that his original agreement should stand in abeyance pending the performance of the second contract. If there be any question as to the complete lack of a legal identity between the American Trading Company (Pacific Coast) and the American Trading Company, the defendant in this action, a glance at defendant's plea in abatement, found at page 4 of the record, and at the defendant's amended answer, found at page 22 of the record, is sufficient.

Of course the original agreement was ultimately that of the defendant corporation, but this was not apparent at the time the contract was made, and was so only on the principle of undisclosed agency. (Record p. 170.)

The four cases relied upon by counsel to establish that the letter of August 27, 1918, is merely an amendment or supplement do not control the case at bar. They establish the rule that a contract

with reference to the subject-matter of a former one does not necessarily supersede or destroy the obligations contained in the former, except in so far as the new one is inconsistent therewith. We have no quarrel with such a rule, and we are not asserting that by the making of the second agreement in this case the old one was destroyed or terminated. The only effect upon the original agreement was the modification of a single one of its terms, to-wit: the time at which actual service under it should commence. The second agreement not being with reference to the same subject-matter, it is clear that these authorities are not in point.

There is one statement, however, in defendant's brief which requires correction. It is said on page 42 thereof that "it" (referring to the agreement of August 27, 1918) "specifically provides that the services rendered under it should constitute services under the three year contract". There is, of course, no such provision in the letter of August 27, 1918.

What *is* said is, "This time" (referring to the estimated six months which would probably go by before the return of Mr. Boyd) "will, of course, apply on your three years' term as mentioned in your original contract." This is far from saying that services under the second contract will constitute services under the first. The time will apply in cutting down the period of service under the first, but the services will not be a performance of the first.

It is also to be noted that plaintiff might have been willing to contract expressly to render services satisfactory to the American Trading Company when he made his contract originally in San Francisco because he was dealing with Mr. Louis A. Ward, a man whom he had known for some time and whom he regarded as a personal friend, whereas he probably objected to binding himself to such a contract in Tokio. When the agreement of August 27, 1918, was made in Tokio, he was dealing with Mr. Blake, who was a stranger to him, and it may well be that he declined to permit any paragraph with regard to the satisfactoriness of the services to be inserted in the agreement.

2. Even though services rendered at Tokio were required to be rendered in an efficient and satisfactory way, defendant was not the sole judge of whether such services were satisfactory.

Even though we should be held to be wrong in our construction of the agreement of August 27, 1918, as being a separate and independent contract, and even though this court should hold that the clause with regard to satisfactory service which was contained in the letter of May 27, 1918, controlled the activities of plaintiff while in the employ of the defendant at Tokio, nevertheless defendant could not be the sole and arbitrary judge of whether or not such services were actually satisfactory.

The numerous cases set forth in Section I of defendant's brief to the effect that where a contract

of employment requires services to be satisfactory to the defendant, he is the sole judge of their satisfactory nature, are examples of the citation of authority without the necessity of so doing. In practically every one of them the contract in suit expressly provided that *the services should be satisfactory to the employer.* Where there is such an express provision in the contract, there can be no dispute that the employer is the sole judge of the satisfactoriness of the services provided he acts in good faith. This is the doctrine in Tiffany v. Pacific Sewer Pipe Co., 180 Cal. 700, and undoubtedly represents the vast weight of authority. The paragraph, however, with regard to satisfactory services contained in the letter of May 27, 1918, is not so phrased, the language there being,

> "The undertakings herein contained on our part are all conditioned upon your doing your work in an efficient and satisfactory way."

It is one thing to stipulate that work shall be done to the satisfaction of the employer. It is quite another to say that work shall be done in a satisfactory way. Where a contract provides that work should be done in a satisfactory way it means that it shall be done in a way which would be satisfactory in the judgment of a reasonable man. There are very few decisions in which this distinction has been even referred to, but we believe that it has been established in this state. The case of Tiffany v. Pacific Sewer Pipe Co., *supra,* is most strongly relied upon by defendant in its

brief as being the latest decision in the jurisdiction where the contract in suit was made. We admit that the contract is to be construed in the light of California decisions.

However, there is an intimation in the Tiffany case to the effect that this doctrine applies only where the contract specifically provides that the "services shall be satisfactory to *the employer*" and that it does not apply where the contract simply provides that the services shall be satisfactory without stating to whom satisfaction shall be given. These words are found on page 705, where the court says:

> "The terms of the contract imply that the defendant was not compelled to be satisfied if the quality produced equaled that which was being produced at the time the contract was made. The addition of the phrase 'and satisfactory to the Pacific Sewer Pipe Company' implied a complete satisfaction and authorized the defendant to reject the brick or discharge Tiffany under the terms of the contract if for any reason of any character the quality or quantity of the product was not satisfactory. We think the contract falls within the rule applicable to cases where the judgment of the promisor is involved, and that his decision that he is not satisfied is conclusive on the other party and upon the court to which the question is presented."

The Tiffany case cites as authorities the cases of Parkside Realty Co. v. MacDonald, 166 Cal. 426; Allen v. Pockwitz, 103 Cal. 85, and Church v. Shanklin, 95 Cal. 626, in all of which cases it was

held that where real property is purchased subject to the owner giving a satisfactory title, if the memorandum requires that the title be satisfactory to the attorney of the buyer, this attorney's good faith in determining that it is not satisfactory is the only thing that is required. It is to be noted, however, that in Allen v. Pockwitz the case of Winter v. Stock, 29 Cal. 407, is referred to and distinguished, but by no means criticized. In it, the seller stipulated that he warranted an indisputable and satisfactory title or no sale. The court held that under such a memorandum the test of satisfaction was whether or not the title was legally valid. The ground upon which the Winter case was distinguished in Allen v. Pockwitz was, of course, that in the former case no one was named to whose satisfaction the title should be perfected, and this is the exact distinction between the contract of Steele with the American Trading Co. and the contract of Tiffany with the Sewer Pipe Co.

Cases from other jurisdictions which refer to this distinction between services satisfactory to the employer and services performed in a satisfactory way or manner, and which hold that in the latter case the element of reasonableness comes into the case, are:

Bridgeford v. Meagher (Ky.), 138 S. W. 75;
Ames v. Sniveley (Kansas), 96 Pac. 943;
Lord v. Industrial Dyeing, etc., Works (Pa.), 94 Atl. 573.

3. **The failure of defendant to refer to and rely upon any dissatisfaction which it felt with plaintiff's services at the time of discharge is fatal to the defense that the services were actually unsatisfactory to it.**

We agree with counsel that ordinarily it is not incumbent upon an employer to give all or any of the reasons for the discharge at the time that he terminates the contract of employment, and that, as a rule, he may at the trial rely upon any defenses which he may have had even though they were not stated previously; but in this case, where defendant is seeking to justify its action upon the ground that at the time of the discharge it was possessed of a certain state of mind, to wit, a dissatisfaction with the way in which plaintiff rendered his services, it was certainly incumbent upon it to express such dissatisfaction in order to avoid the appearance of bad faith, particularly when every circumstance attending the discharge pointed so very strongly in the same direction. Even if we are wrong in our contention that there was no term in the contract under which plaintiff rendered his services in Tokio which required him to render them in a satisfactory way, nevertheless defendant was required to exercise in good faith whatever right it had to determine whether or not the services were satisfactory. It could not discharge plaintiff for some business reason or reason of convenience, and then, in bad faith, rely upon a trumped-up claim that it was in reality dissatisfied.

We cannot conceive of a stronger combination of testimony pointing toward bad faith than the failure of defendant to express any dissatisfaction at the time of discharge and the writing of the letter of March 19, 1919, by Mr. Blake to Mr. Steele. This, taken in conjunction with the letter of the same date written by Mr. Blake to Mr. Ward, Vice-President of the American Trading Company (Pacific Coast), shows conclusively that at the time of the discharge Mr. Blake did not have at all in mind any dissatisfaction with plaintiff and was simply getting rid of him because of the fact that Mr. Manley, the accountant in the Shanghai office, had changed his mind and decided to stay in Shanghai, and that Mr. Boyd at the same time had given notice of his early return to Tokio from his vacation. These letters are found at pages 135 and 136 of the Record. We admire the boldness of counsel in referring to these letters at all in his brief, as we consider them the strongest possible evidence that the discharge of plaintiff was made in bad faith. The manner in which it is sought to escape the force of these letters is a claim that upon the face of the first of them there appears the hint that there had been a prior conversation and that in that conversation dissatisfaction had been expressed by defendant. In this connection there is in the brief the following excerpt from the letter to Mr. Steele:

> "With reference to our conversation of a few days ago, we beg to confirm what we told you at that time to the effect," etc.

This, it is contended, shows that the contract had been terminated, and had been terminated with the approval of plaintiff, and that at the time of the termination dissatisfaction had been expressed. When the whole paragraph from which the above excerpt is taken is read, no such hint can be gained. The paragraph proceeds as follows:

> "* * * that we had received word from Mr. Burns, agent of our Shanghai office, that as he had made satisfactory arrangements with Mr. Manley to remain with the company, he did not want you to come to Shanghai."

The completed paragraph shows simply that the conversation therein referred to was a conversation in which Mr. Blake intimated that Mr. Manley would stay in Shanghai and that they would have no place for Mr. Steele there. As to the letter of March 19, 1919, the trial court well says in its opinion that inasmuch as it was one from an executive officer of the American Trading Company to an executive officer of the American Trading Company (Pacific Coast), he might well speak without reservation. Yet there is not a hint of any dissatisfaction with the services rendered by the plaintiff. The fact that a copy of the letter was given to Mr. Steele does not affect the situation. If Mr. Blake had really had any dissatisfaction to express, he would have expressed it, and then either failed to show this letter to Mr. Steele or have written a separate letter for Mr. Ward's own perusal in case he did not wish to let Mr. Steele know of

his dissatisfaction. Just why defendant should desire to be so tactful and so solicitous of the feelings of plaintiff, it is hard to understand. Defendant was entirely willing to transport him to the Orient, and then to cast him adrift after less than a year's service without making any satisfactory arrangements for his return or for his compensation, but it was too kind-hearted to tell him that it was not satisfied with the manner in which he did his work.

The situation is much the same as that which existed in the case of Delano v. Columbia Co., 166 N. Y. Supp. 103, a case relied upon by defendant in another connection. In this case plaintiff was employed as an inventor and expert mechanic in the production of ignition and starting devices for automobiles. Shortly after his employment had begun, the defendant company became interested in the munitions business and lost its interest in ignition propositions. As the work of the defendant company turned more and more toward munitions, its automobile device business so dwindled that there was soon very little use for plaintiff's services, and he was discharged. The contract of employment had a clause in it which provided that he might be discharged in case defendant should be dissatisfied with the employee. The court said:

> "This was peculiarly a case for applying the rule, settled in this court, that while the employer has an absolute right to discharge the employe for dissatisfaction, upon such conflicting evidence, as above outlined, and the infer-

> ences that may be drawn therefrom, a question of fact is presented to the court as to whether the dissatisfaction was genuine or feigned. Beck v. Only Skirt Co., 176 App. Div. 867, 163 N. Y. Supp. 786; Diamond v. Mendelsohn, 156 App. Div. 636, 141 N. Y. Supp. 775. See, also, Zahler v. Mann. 97 Misc. Rep. 19, 160 N. Y. Supp. 1085. The appellant's main exception is to the court's refusal to dismiss the complaint on the theory that the right to discharge was arbitrary, and no question of whether the reason assigned was genuine or not should have been submitted to the jury. But, upon the authorities referred to, the genuineness of the alleged dissatisfaction was a question of fact."

The same question of fact existed in the case at bar; that is to say, even though defendant had the right of discharge if dissatisfied, did it, or did it not, terminate the employment because it actually was dissatisfied, or because it was embarrassed by the possession of too many satisfactory accountants?

Even granting that there is direct testimony in the record that the company was dissatisfied with his services at the time of his discharge—which is a doubtful proposition—nevertheless there is very positive testimony contained in the correspondence tending to show that it did not discharge him by reason of any dissatisfaction at all, but simply because it did not need the services of another accountant. There are no findings by the court in the case, and therefore the judgment entered by the trial court amounts to a general finding in fa-

vor of the plaintiff, which must be sustained if possible. It may well be argued that there having been a conflict of testimony on the issue of whether or not the American Trading Company was in fact dissatisfied, the judgment will not be disturbed. Such a manner of sustaining the judgment is suggested in the most recent Federal case upon the subject of satisfactory services, to wit, the case of Computing Scale Co. v. Barnard Co., 259 Fec. 250. In that case the court reversed a judgment rendered in favor of the plaintiff who sued for a breach of a contract to manufacture a patented article and pay plaintiff a royalty provided that the patented article proved satisfactory. In so reversing the judgment, the court intimated that had there been any testimony whatsoever in the record to the effect that the defendant really was satisfied, instead of there being mere suspicious circumstances which might possibly point to such a conclusion, it would not have disturbed the judgment. In this connection the court said:

> "We must approach this question recognizing that, since there was a general finding for plaintiff and since that finding would be sufficiently supported if the record contained evidence fairly tending to show that the Scale Company's claim of dissatisfaction was made in bad faith and while it was in truth and in fact satisfied that the device would be a commercial success, the matter of law for us to decide is whether there was any substantial evidence to that effect; but we are neither embarrassed nor aided by the presence of any finding by the district judge on that question. He

was of opinion that actual effort to put upon the market was necessary before the Scale Company was at liberty to assert its failure to be satisfied with commercial success, and hence he considered the evidence only from the standpoint of the actual merits of the article, and not with reference to whether the company was really satisfied."

4. Services unsatisfactory at Tokio were not necessarily services unsatisfactory at Shanghai.

Again conceding for the sake of argument that defendant had the right to discharge plaintiff if in good faith dissatisfied, it is one thing to claim that whatever services he had rendered at Tokio were unsatisfactory, and it is quite another to contend this his services would be unsatisfactory in Shanghai if he were permitted to go to that city and attempt performance of his original agreement. This is a point upon which the trial court relied very strongly, and we believe that it is unescapable. Plaintiff agreed in San Francisco to go to Shanghai, and there to perform his services in a satisfactory way. He did not agree to perform them in a satisfactory way at Tokio or anywhere else. Even though it be assumed that the letter of August 27, 1918, carried, by implication, as one of its terms, a provision similar to the satisfactory service provision contained in the original agreement, nevertheless a failure on the part of plaintiff to perform such satisfactory services at Tokio could not have precluded him from an attempt at such performance at Shanghai. The different

surroundings, locations, business associates, and particularly office personnel, might have had a decided bearing on the nature of the services rendered. It was therefore, in any case, the right of plaintiff to be given a trial at Shanghai.

5. In this case, defendant was not justified in relying upon alleged delinquencies or shortcomings of plaintiff unless it was aware of their existence at the time of discharge.

While it is true that in general an employer is entitled to rely upon the shortcomings of his employee, whether these shortcomings were known to him and relied upon by him at the time of discharge or not, such is not the case where the contract provides that the services shall be to the satisfaction of the employer and the discharge is attempted to be justified upon the theory of the lack of such satisfaction. We have no cases to cite in this connection, but it is obvious that the general rule would not apply under such circumstances. Where an employer seeks to justify the discharge on the ground of dissatisfaction, it is absurd for him to assert that he may rely upon misconduct of which he was not aware at the time of the discharge. Inasmuch as the employer's state of mind is, under such circumstances, the only thing to be looked to, facts which are not known at the time to the employer can certainly have no bearing upon the state of mind in question.

We do not believe that any of the cases relied upon by counsel go so far as to assert such a prop-

osition, and if any of them may be so construed, we are certain that the court will not follow such an obvious illogicality.

In connection with this question of the state of mind of the employer at the time of the discharge, it is a significant fact that the actual date upon which Mr. Steele was notified that his services would not be required in Shanghai at all, and would not be required in Tokio after the return of Mr. Boyd from his vacation, was as early as March 19, 1919, and that he remained in the service of the defendant in its Tokio office, in the capacity of chief accountant, until the actual return of Mr. Boyd about the 1st day of May of that year. It is apparent, therefore, that there was a period in the employment of Mr. Steele at Tokio of about six weeks, during which he was aware that he had been wrongfully discharged from employment, during which he became increasingly more certain that nothing satisfactory would be done with regard to the settlement of his claim, and during which he nevertheless continued to occupy his position of responsibility and authority with the defendant. Is it surprising that, during such a period and under such circumstances, friction should develop between the defendant and the employee? It is very surprising, indeed, that actual hard feeling did not develop sooner than it did. It is a fact that, according to the testimony of Mr. Steele, he had no actual hard words with Mr. Blake himself until the 30th of April. A careful reading of the record, par-

ticularly with reference to plaintiff's "Exhibit H", containing a careful resumé of Mr. Steele's activities in Tokio on behalf of the defendant company, shows clearly that whatever irritation arose, and whatever minor infractions of strict rules plaintiff was guilty of, occurred during this period subsequent to March 19, 1919. Such a situation more than lends color to the theory which we have before expressed, that any dissatisfaction claimed by defendant to have existed even in its own mind was wholly an afterthought and an outgrowth of the discharge of defendant rather than something which actually existed at the time the discharge took place. An attempt has been made to distort this situation into an agreement on the part of Mr. Steele to a cancellation of his contract. As we have already pointed out, the record supports no such contention. It is true, as stated by Mr. Blake in his letter of March 19, 1919, to Mr. Ward, that plaintiff "was quite willing to come to a friendly understanding with the American Trading Company." There is not, however, in such words the slightest intimation that he was willing to drop any claim that he had against them for wrongful and unjustifiable discharge from their employ. His willingness to come to a friendly understanding with them was simply the willingness of any person whose services had become unnecessary to his employer, to accept, in lieu of the performance of his contract, another employment or a payment in money. It is quite apparent that on March 19,

1919, Mr. Steele did cherish some such illusions with regard to an amicable settlement, and it was the gradual destruction of these illusions which developed whatever of ill feeling is shown to exist between himself and the Tokio office of the defendant.

6. The record discloses no real justification for dissatisfaction.

If the trial court was correct in its assumption that the clause contained in the agreement of May 27, 1918, was not carried over into the agreement of August 27, 1918, one of the issues in the trial of the case at bar was whether or not there actually existed the reasonable ground for dissatisfaction required of defendant with the service of the plaintiff. We concede that there is possibly in the record some testimony with regard to trifling infractions of rules by plaintiff. The general finding of the trial court, however, having been in favor of the plaintiff, and there having been a conflict of evidence on this point, such a finding is conclusive.

We will, however, for the purpose of showing how little counsel was able to prove any real ground for dissatisfaction, refer to these alleged infractions. Complaint is made that plaintiff was sometimes late in reaching the office, on several occasions getting there at 9:30 a. m., when, according to office rule, the office opened at 9:00. In this connection it must be borne in mind, as the trial court said, that plaintiff was not a mere clerk, and had the right to use some discretion with regard to time of

arrival if he did his work satisfactorily. There is also in evidence the uncontradicted testimony of Mr. Steele to the effect that although the office rules allowed the interval from 12:15 to 1:30 for lunch, he never took any time out for lunch at all, and that he always remained at the office until six o'clock instead of quitting his post at 5:00 p. m., as he was entitled to do. (See Record, page 47.) It is further contended that he made himself objectionable in his criticism of the business methods employed in the Tokio office. When it is realized that such criticisms were, most of them, made subsequent to his notification of discharge, and were confined wholly to the manner in which the auditing or financial end of the business was conducted, and were, furthermore, aimed at obsolete methods condemned by the auditors of the company (see Record, page 64),—such an objection to Mr. Steele's services carries no weight at all. Lastly, great emphasis is laid upon the fact that he wrote to Mr. Louis A. Ward, in San Francisco, certain letters, criticising the manner in which the finances of the Tokio office were handled and audited. This, according to Mr. Blake and according to the brief of defendant, constituted treachery on his part to the organization which employed him. Had these letters been addressed to a person entirely unconnected with the American Trading Company, such an objection might be well founded. It must be remembered in this connection, however, that Mr. Steele was originally employed by Mr. Louis A.

Ward, the Vice-President and General Manager of the American Trading Company (Pacific Coast), and at the time the former wrote these letters he believed Mr. Ward to be a superior officer in the same company in which Mr. Blake was an officer and of which the Tokio office was a part. He did not at that time know that, as a matter of law, the two corporations were distinct. Mr. Blake himself admits that Mr. Steele informed him that he was writing some such letters to Mr. Ward, but he did not state the exact nature of them (see Record, page 119). Not only this, but the two letters most objected to, namely: those of April 17th and 24th, 1919, were both written a month subsequent to plaintiff's notification of discharge, and therefore could have no bearing either upon the satisfactoriness of his service prior to the date of his discharge or on the state of mind of the employer at the time the discharge was made.

II.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS WAS PROPERLY DENIED FOR THE REASON THAT NO REPLICATION WAS NECESSARY IN THIS CASE.

1. Neither under the common law nor under the Alaska code was a replication required where the pleadings were such as existed in this case.

It is contended that plaintiff, by failing to deny in his replication the allegation contained in the answer to the effect that the alleged services ren-

dered by him had been neither satisfactory nor efficient as required by the contract, admitted that his services were unsatisfactory and inefficient. It is upon this ground that plaintiff's motion for a judgment on the pleadings was urged. An effort is made in the brief of defendant to show that, under the rules of procedure existing in the United States Court for China, such a denial in the replication was essential. This view is predicated upon the assumption that either the Alaska code or the common law rules with regard to replications applied to pleadings in the court below. Assuming for a moment, for the sake of argument, that the common law rule and the provision of the Alaska code in this regard do apply, nevertheless we maintain that, under the pleadings as they were constituted by the complaint and the answer in this case, no denial of the alleged unsatisfactoriness of services was necessary at all.

The complaint alleged that defendant "wrongfully, improperly and without cause or reason, on or about March 17, 1919, dismissed and discharged the plaintiff" and thereby breached the agreement of May 27, 1918, a copy of which was attached to the complaint as an exhibit.

The amended answer of the defendant contained as paragraph 10 the following:

> "10. That the alleged services rendered by the plaintiff herein to the defendant were neither satisfactory nor efficient, as required in the contract alleged in plaintiff's petition,

> a copy of which is attached thereto and marked Exhibit A, and that the said plaintiff in the performance of his alleged duties was inefficient, negligent and insubordinate to his superiors."

Though a replication was filed by plaintiff, there was in it no denial that his services had been unsatisfactory or inefficient.

Granting for a moment that the Alaska code controls the pleadings in this case, no replication was necessary where the complaint and the answer stood as they stand in the case at bar. Section 69 of that code, upon which counsel relies, is as follows:

> "Sec. 69. If the answer contain a statement of new matter, constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law or rule of the court, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it he may have a jury called to assess the damages." (31 St. at L. 343.)

The question then arises, Is the allegation contained in the amended answer to the effect that the services of plaintiff were neither satisfactory nor efficient as required in the contract, new matter constituting a defense or counterclaim as the words are used in Sections 69 of the Alaska code? We submit that they are not, for the reason that the complaint, in relying upon a breach of contract in this case and in alleging that the discharge was wrongful, improper and without cause or reason,

virtually anticipated the defense that the services were unsatisfactory or inefficient, and therefore the allegation in the answer to the effect that these services were not satisfactory or efficient constituted a denial, couched in a slightly different phraseology, of the exact allegation of the complaint. It is well settled that it is not necessary to deny in a replication such allegations of an answer.

Fortunately, we have a decision of the Federal District Court for Oregon which passes upon an Oregon statute which has practically the same provision as Section 69 of the Alaska code above quoted; in fact, it is probable, as is hinted in defendant's brief, that the Alaska code was copied from the Oregon code. This provision of the Oregon code is set forth in the case above referred to, to wit, Watkinds v. Southern Pacific R. R. Co., 38 Fed. 711, as follows:

> " 'If the answer contain a statement of new matter, constituting a defense, and the plaintiff fails to reply thereto, the defendant may move the court for such judgment as he is entitled to on the pleadings'."

In the Watkinds case, a complaint, based upon personal injuries by reason of the defendant's negligence, alleged that the injury occurred through no fault or negligence of plaintiff. Defendant's answer denied that through no fault or negligence of plaintiff plaintiff was injured as alleged in the complaint. The answer contained a further alle-

gation that defendant had used due care and diligence in the matter complained of and that the alleged injury was not caused by the negligence of the defendant, but was wholly due to the fault and negligence of plaintiff himself. This additional allegation in the answer was, in effect, therefore, a defense based upon contributory negligence, which defense was, of course, anticipated in the complaint by the allegation that the injury had occurred through no fault or negligence of plaintiff. No reply was made to this so-called defense, and thereupon the defendant moved for a judgment on the pleadings. In denying such a motion the court said (p. 713):

> "But the plaintiff having chosen to allege in his complaint that the injury occurred without fault or negligence on his part, and the defendant having chosen to meet this allegation with a specific denial of the same, there is an issue of fact formed on this question which must be tried as such before a judgment can be given in the case.
>
> The statute in authorizing a judgment on the pleadings in case no reply is made to a defense, presupposes that the facts constituting such defense are not elsewhere stated or put in issue in the pleadings; in short, that they are 'new matter'."

The rule expressed in the Watkinds case represents that followed apparently in all jurisdictions where a replication is recognized as a pleading. It has been followed in Oklahoma in the case of Muskogee Vitrified Brick Co. v. Napier (Okla.),

126 Pac. 792, where the action was one of an employee personally injured while in the service of the defendant employer. In denying that a directed verdict should have been given in the case for the defendant, the court said:

> "The first contention under this objection is without merit. The parties were at issue on all material matters. The plaintiff alleged that he had been ordered to oil the wheels while in motion; that he did so without any negligence upon his part. The defendant denied giving the order, and then alleged that plaintiff, in violation of its orders, was injured through his own negligence. This was merely a traverse of the allegations of the petition. The important thing was: Did he give the order, and was plaintiff negligent in obeying it?"

In Ward v. Sturdivant (Ark.), 132 S. W. 204, in an action brought to restrain a sheriff from executing a deed to land sold under execution, the court said:

> "The affirmative allegations in the complaint in this case that the judgment was the property of the estate of Susan Jones were in effect denials of the averments made by appellants in the answer that Ward was the owner thereof by reason of a right of subrogation thereto. Such averments in the answer were matters of defense and required no reply. They were therefore not admitted, but required proof to sustain them. 18 Ency. Plead & Prac. 696; Watson v. Johnson, 33 Ark. 737; George v. St. L. I. M. & S. R. Co., 34 Ark. 613; St. Louis I. M. & S. R. Co. v. Higgins, 44 Ark. 293."

In Dueber v. Wolfe (Wash.), 92 Pac. 455, in an opinion in which Judge Rudkin concurred, it was held that in an action by a married woman to quiet title to a lot sold under execution, the plaintiff's motion for judgment on the pleadings was properly denied, the court saying:

> "The next contention is that the court erred in refusing to grant the appellant's motion for judgment on the pleadings, for the reason that the respondent did not deny the affirmative allegations in the answer. These allegations were, in substance, that the debt for which the judgment was obtained was a community debt contracted for the support of the community, and that certain improvements had been put upon the property with community funds; but these averments tendered no new issue. They but tended to show that the property levied upon and sold was community property, a question already at issue by the allegations of the complaint and the denials contained in the answer."

To the same effect are Pott v. Hanson (Minn.), 124 N. W. 17; Persse v. Gaffney (Colo.), 47 Pac. 293, and Ermert v. Dietz (Ky.), 44 S. W. 138.

It is thus clear that neither under the common law nor that codification of the common law principle with regard to replication found in the Alaska code was it necessary for a defendant to reply to such allegations as that found in the answer of defendant in this case with regard to the satisfactoriness of services. They were not new matter. That being the case, defendant was in no wise prejudiced by the state of the pleadings. It is apparent that

the plaintiff did not deny the allegations in question for the reason that he deemed them not to be new matter and therefore not requiring a denial. If defendant really was misled by this state of the pleadings, and honestly supposed that plaintiff had thereby admitted that the services were unsatisfactory—which, by the way, is something which we do not for a moment believe—it was misled by its failure properly to understand the nature of the pleading, and must abide the consequences.

It is further to be remembered that in considering the effect of the Alaska code, that the provision concerning a replication is not mandatory, but merely allows such a pleading to be filed, the words of the statute in Section 899 being as follows:

> "The plaintiff may reply to such new matter."

The same statute, Section 929, also provides

> "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party."

2. The allegation contained in the answer with regard to the unsatisfactory nature of the services was so vague as to require no replication.

Even though a replication would ordinarily have been required in this case had the allegations contained in the answer with regard to the unsatisfactoriness of services been clear cut, nevertheless no

reply to the allegations contained in this particular amended answer was necessary because the allegations of said answer were so vague as to make it impossible to determine to what services they referred. The trial court, in its opinion in this case, was indeed right in saying that where a party relies upon such a technical rule as is here contended for by defendant with regard to its motion for a judgment on the pleadings, its own pleadings will be scrutinized with the minutest care.

3. The long continued custom in the United States Court for China of the practice of deeming new matter contained in an answer to be denied, is so well established in that jurisdiction as to be controlling.

As the trial court says in its opinion, replications to new matter contained in an answer have not been customary in that jurisdiction. This being the established custom in the court in which this case was tried, this court should certainly not go out of its way to reverse a judgment rendered in favor of one who had, in good faith, relied upon such practice. The case was indeed tried upon the theory that plaintiff did not admit that the services were either unsatisfactory or inefficient, and no one was prejudiced by the condition of the pleadings. In view of the fact that counsel for defendant agreed to withdraw their motion for an order taking depositions in consideration of the waiver by counsel for plaintiff of objections, on the ground of hearsay and the best evidence rule,

to the testimony of Mr. Burns, no prejudice can be claimed in this regard, nor can any deficiency in the proof of defendant's case be sheltered under such a cloak (see Record, page 168).

4. Neither the statutes of the United States nor the common law rule with regard to replications actually applies to the matter of such pleadings in the United States Court for China.

Under Subdivision 1 of this section of our brief, we assume for the sake of argument that the Alaska code and the common law rule with regard to replications applied to procedure in the United States Court for China. We do not, however, actually concede this to be the case. The statute conferring jurisdiction upon the consular courts is found at Section 4086 of Federal Statutes, Annotated, and is as follows:

> "Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties, respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law

> of equity or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies."

As we construe that statute, the laws of the United States were extended to the territory covered by the treaties, with the proviso that where such laws were not adapted to the object, or were deficient, the common law, together with the law of equity and the law of admiralty, should be extended to such territory; and with the further proviso that if neither the common law nor the law of equity nor of admiralty, nor the statutes of the United States, were *appropriate and sufficient* remedies, the ministers to these countries should, by their decrees and regulations, set up rules of their own. The old consular regulations in effect before the passage of the statute creating the United States Court for China, are an example of the exercise of this power by the ministers in those countries. According to Section 5 of those Consular Rules, the two pleadings, and the only two pleadings, required, are a complaint and an answer. If the persons framing the consular proceedings had deemed a replication to be an "appropriate" pleading, doubtless it would have been included. By omitting it, while at the same time recognizing a complaint and an answer, these regulations definitely establish that a replication was not a necessary pleading in that jurisdiction.

When the United States Court for China was established, in 1906, a provision was made for the procedure to be followed in that court, as follows (5 Fed. Stat. Ann. 2nd Ed. 1104):

> "Sec. 5. (PROCEDURE.) That the procedure of said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China, in accordance with the Revised Statutes of the United States; *Provided, however,* that the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure. The provisions of sections forty-one hundred and six and Forty-one hundred and seven of the Revised Statutes of the United States allowing consuls in certain cases to summon associates shall have no application to said court. (34 Stat. L. 816.)"

The section above quoted, in providing that the procedure of said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China, expressly made the old consular regulations a part of the procedure of such court. The proviso that the judge of the court should have authority from time to time to modify and supplement these rules of procedure, is of no importance in view of the fact that, so far as a replication is concerned, he has not done so.

We submit therefore, that the old consular regulations having altered the common law and statute law upon the subject of the need of replications, are controlling and binding upon the United States Court for China at the present time, and that there-

fore no replication at all was required to be filed in this case.

Our reasoning under this subsection of our brief follows the exact lines of the opinion of Judge Thayer of the United States Court for China in the case of United States v. Charles A. Engelbracht, 1 Ex. Ter. cases 169, a considerable portion of which opinion is found at Appendix A of this brief. In that case the defendant was proceeded against for the crime of embezzlement upon information filed more than three years after the commission of the crime. The accused filed a plea in bar relying on Section 1044 of the Revised Statutes of the United States which provides that a three-year limitation shall apply to such crimes. In holding that the plea in bar was not good, the court held that Section 82 of the Consular Court regulations prescribing a six-year period limitation for heinous crimes applied rather than Section 1044 of the Revised Statutes. In reaching this conclusion the court went upon the theory that neither the common law nor any statute of the United States was controlling over a rule of the United States Court for China after that court had been established on June 30, 1906, the procedure of the Consular Court regulations having been expressly adopted by said Act of June 30, 1906, at Section 5 thereof. The language of the court in this connection is in all respects a confirmation of our view already expressed above upon this subject, and is as follows:

"All the existing Regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed, under well established doctrine, that Congress had full knowledge thereof. In fact, it appears to the Court that the provision referred to cannot be considered as anything less than an affirmative recognition and confirmation of such of these regulations, at least, as relate to procedure. Whether or not the act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this act, the court does not at this time undertake to say. It is proper to note, however, that Congress had this opportunity to annul or modify any of these Regulations but did not.
* * *

If Section 1,044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the act creating the Court. Rule 82 of the Consular Court Regulations is made the law of this jurisdiction respecting the limitation of criminal prosecutions."

III.

THE TRIAL COURT DID NOT ERR IN RESERVING RULINGS ON OBJECTIONS TO THE ADMISSIBILITY OF EVIDENCE.

1. The opinion of the court in this case took the place of such a ruling.

It is contended by counsel that the trial court erred in reserving ruling upon certain objections to the admissibility of testimony adduced on be-

half of plaintiff inasmuch as no express ruling was made upon these objections prior to judgment.

The nature of the testimony to which such objections were made was that it went to show that the services of Mr. Steele were reasonably satisfactory. The point of the objections was that inasmuch as plaintiff had admitted, by his failure to deny in his replication, the allegations contained in the answer that the services were actually unsatisfactory, this issue was not open at the trial. We have dealt with the merit of such a claim concerning the effect of the pleadings, under Section II of this brief, and it is unnecessary to go into that matter again at this point. We believe, however, that under that section we have established the fact that the court was right in holding that it was unnecessary to make such denials in the replication. If the court was right in reaching such conclusion, its decision on that point was also a ruling upon the question of the admissibility of testimony, objections to which were based upon the necessity of such denials.

The only cases referred to by counsel in support of the proposition that such a reservation and failure subsequently to rule is error, are Stanwood v. Carson, 169 Cal. 640, and several earlier California decisions. There is no intimation that such a rule would be followed by any Federal Court or in particular by the United States Court for China, especially where the effect of the ultimate decision of the court is to render such specific rulings unnecessary.

2. Even under the rule existing in California, the reservation in this case would not amount to reversible error.

But even if this court were to hold that the California rule with regard to reservation of rulings did bind the United States Court for China in the trial of this case, still a reversal could not be predicated upon what occurred at this trial.

Referring to the latest case in California upon this point, to wit, the case of Stanwood v. Carson, *supra,* it is clear that the rule in that state is not simply to reverse cases where ruling has been reserved, but is to inquire into the circumstances and see whether or not by such reservation a party has been prejudiced. It is true that in that case such a practice is reprobated. We do not ourselves believe that it is the most satisactory manner in which to pass upon the admissibility of evidence. It should be borne in mind, however, that the particular point in issue was one which depended upon the construction of a consular court's rules and their bearing upon procedure in the United States Court for China, together with the determination of whether or not the Alaska code controlled, and if so, to what extent. It is not surprising that the trial court was unwilling, offhand, to make a ruling upon this point. In Stanwood v. Carson, *supra,* the court refused to reverse the judgment of the lower court where there had been a reservation of ruling and a failure subsequently to rule expressly, the court saying:

> "It is true, and always has been, that the practice of deciding a case without in terms declaring upon reserved rulings touching the admissibility of evidence is a practice to be reprobated and deplored. In some cases it may work substantial injustice to a litigant. In any case where it can be shown that such a result follows, the error is of sufficient gravity to call for a reversal. But it does not follow that injury is worked in every such case, and it is quite plain that it is not worked in the present case. It may be assumed as being the assumption of greatest benefit to appellants, and as being borne out by the decision which the court reached and expressed in its conclusions of law and judgment, that every one of plaintiffs' objections was overruled. The next matter for consideration is whether any of them of material consequence to plaintiffs' case was erroneously overruled, and, finally, whether by this method plaintiffs were denied the opportunity of introducing other evidence to meet, rebut, and overcome the evidence to the admission of which they objected."

Did, then, the reservation prejudice defendant in its opportunity of introducing other evidence to meet, rebut and overcome the evidence to the admission of which they objected? We submit that it did not. Referring to the record, at page 228, it appears clearly that Mr. A. M. Paget was put upon the stand by the defendant for the express purpose of contradicting the testimony of plaintiff in regard to the satisfactoriness of the latter's services. That the witness was put on for this purpose, and simply and solely in order to meet the testimony objected to and concerning which

the court reserved its ruling, is apparent from the statement of Mr. Bryan, found at the page in the record just referred to:

> "Mr. Bryan. I wish it to be expressly understood that *my* calling this evidence I do not in any way prejudice my rights in my motion for judgment under pleadings. I do not in any way admit that the facts that this witness will testify to are in issue."

After making such an objection, Mr. Bryan attempted, though without much success, to establish that the services of Mr. Steele had been unsatisfactory.

IV.

NOT ONLY WAS THE DECISION OF THE ARBITRATOR IN TOKIO NOT BINDING UPON THE PARTIES, BUT THERE WAS, IN REALITY, NO VALID ARBITRATION AT ALL.

That portion of the brief of defendant which deals with the question of the so-called arbitration and award which took place before Mr. Potter in Tokio, gives evidence of much labor. Although no authorities are cited in that section of the brief, there is a prodigious amount of expanding done. Taking the meager and almost meaningless words of the award, and admitting reluctantly at the start that these words are not "satisfactorily phrased" or "as conclusive as a judicial decision", and that they are more or less "cryptic", counsel proceeds to "spell out of it" something in the nature of a decision, and, with that as a foundation, pro-

ceeds to determine what Mr. Potter really meant. We submit that it has been a noble effort at an impossible performance.

1. The first section of the award of the arbitrator is either a mere expression of opinion or a delegation of authority.

It being admitted in the case that an arbitrator has no authority to delegate his powers of decision to another, and that an arbitration attempting to make such a delegation is void, the question arises, Did Mr. Potter seek to delegate his powers as arbitrator when he used the following language in his so-called award:

> "I am of the opinion that the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement?"

The trial court concluded that either this was what it appears on the face to be, to wit, an attempted delegation of the arbitrator's authority to Mr. Ward, or "nothing more than an expression of opinion or suggestion, in which case it was not an award at all". If it was an attempted delegation of authority, it has the double vice of being an attempted delegation to an executive officer of a corporation belonging to the same international commercial enterprise to which the defendant corporation belonged.

The effort made by counsel to show that this is neither a delegation of authority or mere expression of opinion, takes the shape of a statement, found at page 88 of defendant's brief, of what

counsel believes was really meant by Mr. Potter when he wrote the words above quoted. This interpretation, translation or expansion, or whatever it may properly be termed, is as follows:

> "Mr. Steele has a three year contract executed in San Francisco between himself and American Trading Co. (Pacific Coast) through Louis A. Ward, its Vice President and Manager. I find that American Trading Co. (Pacific Coast) is a corporation separate and distinct from the defendant. Under these circumstances the plaintiff is without recourse against the defendant on the contract of May 27, 1918; he must look to the corporation with which he contracted, namely, the American Trading Co. (Pacific Coast), of which Mr. Ward is the Vice President and Manager. I therefore find against the plaintiff in respect of his claim based on the three year contract, and decide that the only liability on that contract is the liability of the corporation *which really employed the plaintiff*—i. e., American Trading Co. (Pacific Coast), or Mr. L. A. Ward, its Vice President and Manager, to whom I refer the plaintiff."

We fear that such a construction of the first section of the award is almost too imaginative to be a fair and reasonable one. It puts entirely too many ideas into a sentence which does not contain a hint of them and which does not even hint that such ideas were in the mind of the writer when he wrote the sentence. Not only does Mr. Potter fail, in the award, to state that he found that the defendant company was in no way liable to Mr. Steele in connection with the three-year contract,

but such a conclusion cannot even be reasonably drawn from his words. He does not state, or even suggest, that Mr. Steele's only redress is against the American Trading Company (Pacific Coast). He merely says that in his opinion the matter of the three-year contract should be referred to Mr. Ward in San Francisco for settlement. The thoughts attributed by counsel to Mr. Potter may have been in his mind, vaguely; but we submit that if he did not express them in the award, or did not even suggest them, it would be a great injustice to Mr. Steele to read them into that award at this time.

Furthermore, even assuming that such a construction as counsel puts upon the first part of the award were a possible one, that section of the award would avoid the whole by reason of the peculiar terms upon which the matter was submitted for arbitration. In submitting the case to Mr. Potter for his decision, plaintiff used the following language in his letter of May 2, 1919, appearing at page 305 of the Record:

> "* * * whose award must be considered as binding to both parties in the matter of the main issue involved in the case, viz, the amount of compensation to be paid me here at the Tokyo office of the company in *full settlement of all my claims against the company under the two agreements I have with the company.*"

According to the terms of the submission, the arbitrator was to settle all of Mr. Steele's claims against the company under the *two* agreements he

had with the company. That being the case, if the arbitrator had reached the conclusion which counsel asserts that he reached, the award would, nevertheless, be void because in determining that Mr. Steele's only redress was against the American Trading Company (Pacific Coast) he was determining that he could not settle all of the claims under *both* the agreements which Mr. Steele had, and therefore he was in duty bound, not being able to make a complete determination of the matter, to refrain from making any award at all. Where an arbitrator cannot or does not make a full determination of the controversy, according to the terms of the submission, his award is void as to the whole. See 5 Corpus Juris, 143, where the following language is used:

> "The power of the arbitrators being confined by the submission, as already shown, the rule is not only that the arbitrators cannot go beyond the submission, but that they must decide all the matters embraced in the submission, which are brought before them by the parties or which are not withdrawn from their consideration by the parties. If they violate this rule, or if the award shows that they have not acted within it, the award will be void."

Among the cases cited in support of the above quotation in Corpus Juris which are pertinent to the present discussion are:

White v. Arthur, 59 Cal. 33;

Boston & L. R. Corp. v. Nashua & L. R. Corp. (Mass.), 31 N. E. 751.

2. The second portion of the so-called award of the arbitrator renders the award void by reason of the fact that it leaves a portion of the matter in dispute open.

With regard to the necessity of an award being a final and complete determination of matters in dispute and covered by the submission, we again refer to Corpus Juris as an authority. In Volume 5 of that work, at page 139, the following rule is laid down:

> "The award must be such a disposition of the matters submitted that nothing further remains to fix the rights and obligations of the parties, that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties, and that further litigation shall not be necessary in order to adjust the matters submitted."

The rule above referred to is supported by almost uncontradicted authority, and is virtually admitted by the strenuous efforts made by counsel for defendant to show that the second portion of the so-called award really is a complete and final determination of the dispute.

This second portion of the award is as follows:

> "Second. That Mr. Blake should pay Mr. Steele in full until such time as Mr. Steele can secure first-class passage back to San Francisco less any indebtedness that may be proved that Mr. Steele owes Mr. Blake.
>
> Hoping that this conclusion may be mutually satisfactory, I am, gentlemen,
>
> Yours very sincerely,
>
> (Signed) William Potter.
>
> P. S. Mr. Steele's passage to San Francisco to be paid by Mr Blake's Corp."

Counsel contends that the arbitrator, having disposed of the claim of Mr. Steele against the defendant with regard to the three-year contract, then proceeds to decide the dispute existing between him and the Tokio office. By that portion of the award Mr. Steele is given compensation in full until such time as he can secure first-class passage back to San Francisco, and payment of such first-class passage to San Francisco, *"less any indebtedness that may be proved that Mr. Steele owes Mr. Blake"*.

The words which we have italicized obviously leave open the amount of the so-called award so that the burden is immediately placed upon the person claiming finality for it to prove that such finality really existed. An attempt at the assumption of such a burden has been made by counsel by a reference to the five hundred and forty odd yen admitted by plaintiff to be due to the defendant at that time. It is pointed out that plaintiff admitted that this indebtedness on his part amounted to the sum of 545.21 yen, whereas the defendant claimed only 541.21 yen, making a difference of four yen or about $2.00, concerning which, far from being a dispute, there was merely a conflict of proof. Once again imagination is called to the rescue in the interpretation of Mr. Potter's cryptic phraseology, and there is read into the words, "less any indebtedness that may be proved that Mr. Steele owes Mr. Blake" the four yen difference in the two claims. Again we admit

that perhaps Mr. Potter *may* have had this possibility in mind. If he did, he was again unfortunate in his manner of expressing himself, because he does not even hint at such an idea. Under a reasonable interpretation of the language that he did actually use, Mr. Steele would have been perfectly justified had he subsequently determined that he owed the defendant less money than he had at first believed, in claiming that he owed such a lesser sum; whereas, on the other hand, if by a subsequent scanning of their books, the defendant company had come to the conclusion that Mr. Steele owed then five times as much as the 540 odd yen, they would have been justified in claiming such a set-off against what he was to be paid under the award. It is impossible to conceive of language which would more perfectly leave open for future dispute the amount to be paid by one of the parties.

Not only was the matter of amount left open, but the time for the determination of such indebtedness, the manner of proof which would be required, and the tribunal before which proof should be made, are all of them totally ignored. Whether or not Mr. Potter intended that the amount of indebtedness should be proven by an amicable agreement between the parties, by a future reference to himself, or by a resort to litigation in the courts of law, are all of them matters of equal uncertainty. The one thing that is certain about the second portion of the award is that it was wholly lacking in that finality which was necessary to make it binding.

V.

THE TRIAL COURT, IN AWARDING DAMAGES IN THIS CASE, FOLLOWED THE PROPER MEASURE.

1. **The plaintiff's recovery should not have been limited to the period of time intervening between the date of his discharge and the date of the trial, but was properly extended to cover his whole damage for wrongful discharge.**

The plaintiff in this case, having been employed for a period of three years, and having been wrongfully discharged from that employment after the expiration of less than one year of the contractual period, brought this action long before the three-year period had expired. The trial court, in awarding damages to the plaintiff, declared that he was entitled not only to the money which he would have received between the date of his discharge and the date of the trial, but also to that which he would lose between the date of the trial and the end of the contractual period. Such a method of awarding damages is attacked by counsel. This attack is prefaced by the admission that there is a conflict of authority upon the subject. The brief for defendant then proceeds to attempt to show that the weight of authority is against the right of the discharged employee to recover any damages beyond the date of the trial. We submit that this attempt has failed.

The first proposition relied upon by counsel is that the cases which have arisen within this jurisdiction being in conflict, the queston is now open

to this court. In this connection the cases of Schroeder v. California Yukon Trading Co., 95 Fed. 296, and American China Development Co. v. Boyd, 148 Fed. 258, are referred to as the conflicting decisions. There is not the slightest question that the first decision referred to wholly supports the defendant's contention in that it holds clearly that a discharged employee is not entitled to any recovery beyond the date of the trial if he brings his action before the expiration of the contract term. The case of American China Development Co. v. Boyd is just as unquestionably an authority supporting the method of the trial court in awarding damages in this case and in support of our contention in this brief. A conflict then exists; but we do not believe that it is an equal conflict. For numerous reasons the case last cited should prevail over the Schroeder case. First of all, it is a much later decision, having been decided eight years after the Schroeder case. Secondly, it is a decision by a court of superior jurisdiction, inasmuch as it is a Circuit Court decision, while the Schroeder case was the decision of a District Court. Thirdly, it is a decision in a case arising in the United States Court for China, the very jurisdiction in which the case at bar was originally tried, and for that reason it must be taken as laying down a rule for the measure of damages in the United States Court for China in such cases. Fourthly, it is in accord with the subsequent decisions of the Federal courts.

And, lastly, it is in accord with the decided weight of authority in this country at the present time.

In support of our contention that American China Development Co. v. Boyd, *supra,* expresses the doctrine followed in subsequent Federal decisions, we call to the court's attention the case of Lewis v. Sherin Co., 194 Fed. 976, and also the case of Pierce v. Tennessee Coal etc. R. R. Co., 173 U. S. 1. In the latter case the court, in referring to the measure of damages in the case of an employee who had been wrongfully discharged and who had brought his action before the contractual period had expired, said:

> "But he had the right to elect to treat the contract as absolutely and finally broken by the defendant; to maintain this action, once for all, as for a total breach of the entire contract; and to recover all that he would have received in the future, as well as in the past, if the contract had been kept. In so doing, he would simply recover the value of the contract to him at the time of the breach, including all the damages, past or future, resulting from the total breach of the contract."

Small argument is necessary to establish that the trial court is supported by the general weight of authority. We believe that we can establish this by the use of the very authorities relied upon in defendant's brief. At pages 94-95 of that brief there appears a quotation from Sutherland on Damages, 3rd edition, Volume 3, where a portion of Section 692 is set forth. Immediately following that quotation on page 95 of the brief is a statement:

> "The authority then refers to the 'strong and well supported dissent from this doctrine', treating the Wisconsin case as representing the prevailing doctrine."

A careful reading of the paragraph in Sutherland following that quoted in defendant's brief shows that the author does not regard the doctrine of the Wisconsin case as the prevailing one. The language of that following paragraph is as follows:

> "There is, however, a strong and well supported dissent from this doctrine. *The tendency of judicial opinion is in favor of the application of the general rule that all the damages resulting from the breach of a contract must be recovered in one action.* The difficulties in the way of assessing the damages before the expiration of the time during which the contract was to run are not greater than those which exist in some other actions—notably those for personal injuries." (Italics ours.)

The authorities set forth in the footnote in Sutherland, in support of the legal proposition which we have just quoted above, outnumber numerically and are more imposing as to the importance of jurisdiction than the authorities cited by him in support of the contrary view.

In view of the fact that there is admittedly some conflict upon this question in the United States, counsel has been singularly unfortunate in his choice of cases cited as instances of this rule. Although quite a number of cases could have been cited on this proposition which undoubtedly would have

supported him, he has relied upon three decisions from New York Supplement, to-wit: Sommer v. Couhaim, 54 N. Y. Supp. 146; Bassett v. French, 31 N. Y. Supp. 667, and Stein v. Kooperstein, 102 N. Y. Supp. 578. It is true that all three of these cases state unequivocally that a discharged employee may not recover for prospective damages to accrue beyond the date of the trial of the case; they are not authorities for such a proposition, however, at the present time, for the reason that in the well considered case of Davis v. Dodge, 110 N. Y. Supp. 787, the court went at some length into this matter, and after determining that the weight of reason and authority throughout the country, together with the case of Everson v. Powers, 89 N. Y. 527, were contrary to the former decisions in New York holding that the employee could not recover beyond the date of the trial, reversed the court's former position as to these decisions. The doctrine of Davis v. Dodge has subsequently been consistently followed in that state.

In California the question of the allowance of such damages was definitely determined in the case of Seymour v. Oelrichs, 156 Cal. 782, in which case, upon a second appeal reported in 162 Cal. 318, the court reaffirmed its former decision in this regard. In both of these decisions it is clearly held that where the employee brings an action before the expiration of the contract period, he is *prima facie* entitled to the total sum named in the contract less the amount that he has received as wages under the

contract and less also what he has actually made or what he by reasonable diligence should have made, or is likely to make at other employment up to the time set for the termination of the contract. In the first of these decisions by the California Supreme Court it was said:

> "The gist of the complaint is in the breach of the contract and the injury resulting to plaintiff by reason of such breach. The action is not, in other words, one in which the plaintiff seeks to recover wages, but is for damages for the violation of the terms of the agreement by which he was employed for certain compensation to perform services for the defendants for a stipulated term of years. The measure of damages is, therefore, *prima facie,* the contract price."

2. The court did not err in failing to make allowance for any moneys which plaintiff might have earned either up to the time of the trial or thereafter.

Taking the rule of damages as laid down in the case of Seymour v. Oelrichs, *supra,* as being the correct one, it is clear that the plaintiff in this case was entitled to the sum of $10,000, less the amount of $2500 which he admitted he had received as salary for ten months. This left the sum of $7500, which was, *prima facie,* the amount to which he was entitled. If the defendant is to establish its contention that this amount should have been further reduced because plaintiff should have obtained other employment, either before or after the trial, the burden of proof was upon it to show that such employment should reasonably have been obtained.

We submit that such a burden has not been assumed with success.

Counsel asserts that the amount of the judgment should have been cut down beyond $7500 upon the theory that plaintiff should have obtained other employment prior to the time of the trial, and that by the exercise of reasonable diligence subsequent to that time he could have obtained such employment. Such an assertion overlooks two important limitations upon the right of an employer to make such deductions. The first of these is that the employee is not required, in order to mitigate damages, to accept employment of a kind or of a grade substantially different from that which he has had under his contract. Secondly, it overlooks the fact that if the employee has failed to mitigate damages to a reasonable extent the burden is upon the employer to prove such lack of diligence. Upon both of these propositions the record shows clearly that the trial court was right in making no further deductions.

It is virtually admitted in defendant's brief that the general rule does not require the employee to accept work of a different character or grade from that contemplated by the contract. Reliance is chiefly placed upon an alleged limitation of such a rule to the effect that the employee is justified in refusing to accept employment of a different kind or grade only until it becomes reasonably certain that employment such as he has been accustomed to is unobtainable and that thereafter he must ac-

cept any employment in mitigation of damages which may be offered, or suffer such a diminution of whatever damages he may recover from his employer. In support of this limitation, five cases are cited by counsel, the leading one being Kramer v. Wolf Cigar Stores Co. (Texas), 91 S. W. 775. The number of cases cited in the brief becomes less imposing when it is noted that all five of them come from the same jurisdiction, all of them being Texas decisions. We submit that the doctrine enunciated in Kramer v. Wolf Cigar Stores, *supra,* and the other Texas cases, is contrary to the decisions in all other jurisdictions and is wrong in principle. The authorities holding that the discharged employee is not required to accept employment of a different character or grade are so numerous that it is unnecessary to cite many of them here. As an example, however, we refer the court to Hinchcliffe v. Koontz (Ind.), 23 N. E. 271. In that case, with regard to the burden of proof of the reasonableness of the diligence of the employee in seeking other employment, and the kind of employment which he is required to take, the following appears:

> "His duty is to use reasonable care and diligence in obtaining other employment of the same kind, and it lies upon the defendant to show that he did not use diligence, or that other similar employment was offered and declined. Howard v. Daly, 61 N. Y. 362; Chamberlin v. Morgan, 68 Pa. St. 168; King v. Steiren, 44 Pa. St. 99. And it may be remarked, as applicable to one of the instructions of which complaint is made, that, while a servant wrong-

fully discharged is obliged to use reasonable diligence to obtain other employment, *he is not bound to accept employment of a substantially different character or grade.* Many other questions relating to rulings of the court in admitting and excluding evidence are made on the briefs. The questions are not substantially different in character from those already remarked upon. We have carefully examined the several points made, and it is sufficient to say, without setting out each in detail, that they are not sustained. The charge of the court comprises a series of 13 separate propositions, in which the law covering every feature of the case is expounded to the jury with admirable precision and clearness. In a case like the present, the amount of damages to which the plaintiff is entitled, in case the dismissal was wrongful, is *prima facie* the amount stipulated to be paid. This may be reduced in event the defendant makes it appear that the plaintiff either did or could by reasonable effort have procured other employment, or that he did occupy his time at his own or other remunerative business."

Another case which lays down the rule is Inland Steel Co. v. Harris (Ind.), 95 N. E. 271, where the court approved the following instructions:

"The court instructed the jury that it is the duty of a person, when unlawfully discharged, to make reasonable effort to obtain work elsewhere, and that in no event could he recover more than what his actual loss might have been had he made such reasonable effort to obtain employment; that the employment he is required by the law to seek is that which is similar to or of the same general character, is, that which he had contracted to perform; that ap-

> pellee was bound to seek employment which was of the same general character as that of his trade as a roller."

Upon the authority of Kramer v. Wolf Cigar Stores Co., *supra,* counsel also maintains that it was incumbent upon the plaintiff in the case at bar to return to America in case he could not obtain employment of the same grade as that to which he was accustomed. Such an argument entirely overlooks the fact that, so far as it appears from the record, plaintiff might have been stranded without funds in the Orient by reason of his unjustified discharge from defendant's employ, and therefore be entirely without the means of returning to the United States. It is also in conflict with the doctrine laid down in other cases to the effect that an employer has not the right to require that his employee should seek employment elsewhere than at the stipulated place for the performance of the contract. See Costigan v. Mohawk & Hudson R. R. Co. (N. Y.), 2 Denio 609, where the court in this connection said:

> "It should have been business of the same character and description, and to be carried on in the same region. The defendants had agreed to employ the plaintiff in superintending a railroad from Albany to Schenectady, and they cannot insist that he should, in order to relieve their pockets, take up the business of a farmer or a merchant. Nor could they require him to leave his home and place of residence, to engage in a business of the same character with that in which he had been employed by the defendants."

Nothing could be more clearly established than the rule requiring the employer to bear the burden of proving lack of diligence on the part of the employee in seeking other employment. Upon this subject there is the following paragraph in 26 Cyc. at page 1006:

> "*Matters in Mitigation of Damages.* The measure of damages for the breach of a contract of employment by the employer is *prima facie* the sum stipulated to be paid for the services, and the burden of reducing the damages by proof that the servant has, or might, with reasonable diligence, have obtained other remunerative employment after his discharge rests on the employer."

As we do not believe that counsel for defendant has either questioned this rule of the burden of proof, or will be able to question it, we will not refer to any of the numerous cases which support it. Taking this as the rule, the question arises, has the defendant in this case borne such a burden so successfully that it may now ask for a reversal of the judgment upon the ground that it affirmatively appears in the record that the plaintiff might reasonably have mitigated the damages? We not only answer this question in the negative, but we assert that plaintiff has gone further than is required of him and has affirmatively proven that he could not have mitigated, or could not in the future mitigate, the damages awarded by the court. On direct examination the plaintiff testified, at page 178 of the Record, that at the time of the trial he was not employed but that he was seeking employment as

a public accountant. On cross-examination, at page 179 et seq. of the Record, he testified that he had made application to a number of companies, namely, Mitsui, the Standard Oil Company and the Horne Company, without being able to obtain employment as an accountant. On direct examination in rebuttal, at page 253 of the Record, plaintiff testified that he had also applied for employment to Stevenson & Carlson, to the Asia Bank and to the Grace China Co. for employment, without success. On cross-examination in rebuttal, at page 255 of the Record, he testified that he had not accepted, nor was he willing to accept, employment as a bookkeeper, and admitted that such employment was open to him in Shanghai, giving as his reason for such a refusal the fact that in that city a bookkeeper was bunched with Portuguese and Chinese. He further testified on cross-examination in rebuttal that he had called upon Mr. Adams, of the China Realty Company, a man named Merriman, a Mr. Fuller, of the Thomas Simmons Company, and the American Chinese Company. At no time during the trial was either counsel for defendant or one of defendant's witnesses able to suggest a likely employer of accountants without plaintiff being able to state readily that he had called upon that person and had been rejected. It thus appears that prior to the trial, although only a short time had elapsed since his discharge, plaintiff had made extraordinary efforts to obtain employment, and that, without defendant being able in any way to meet the

burden upon it to prove lack of such diligence, plaintiff had in advance established the diligence affirmatively.

It must be borne in mind that the nature of the refusals on the part of the persons to whom application was made by Mr. Steele for employment make it clear that there could be no more hope in the future than there had been in the past. He was not refused because of a temporary oversupply of accountants, but simply because it was not the policy of the large firms in the Orient to employ their principal employees there. That the general rule of law which does not require an employee to accept employment of another kind or grade is peculiarly applicable to conditions existing in China, so far as Americans and Europeans are concerned, is shown by the language of the decision of the trial court in this case. No one could be more familiar with such conditions than he; and he well expresses his view when he says (p. 159):

> "He stated that he could probably obtain a subordinate position as bookkeeper, but intimates (p. 68) that to accept it would cause him to lose standing as an accountant, which anyone familiar with conditions in Shanghai can well understand. We cannot think that a party whose contract has been broken is obliged, in order to reduce his adversary's damages, to accept employment which would affect injuriously his own future career."

In arriving at the conclusion that plaintiff's damages should not be cut down beyond the amount

prima facie due, the trial court must have taken into consideration the fact that defendant could not require the employee which it had wrongfully discharged to return to the United States, and also that it did not appear from the Record that the discharged employee was financially able to do so, or that once here, conditions in this country would be such that he would be successful. In any case, the evidence already referred to as existing in the record was so strong as establishing the diligence of plaintiff in seeking to mitigate damages, and the unlikelihood of the possibility of such mitigation certain, that at least there existed no more than a conflict of evidence upon the question of the possibility of future mitigation. Under such circumstances, there being substantial testimony in the Record in support of the conclusion of the court with regard to the amount of damages, the judgment will not be reversed upon such a ground.

From the foregoing it is clear that the trial court did not err in determining the amount of damages in this case to be the amount *prima facie* due plaintiff, to-wit: the sum of $7500.

VI.

THE COURT DID NOT ERR IN FAILING TO DEDUCT FROM THE AMOUNT OF THE JUDGMENT THE SUM OF $507 MEX. AS BEING DUE FROM PLAINTIFF TO THE DEFENDANT.

The final point attempted to be made by defendant in its brief is that even though a judgment for

plaintiff should have been given in this case, such a judgment should have been cut down at least to the extent of $507 Mex. This sum, it is asserted, was admittedly due from plaintiff to defendant.

The closest scrutiny of the Record fails to disclose any basis whatsoever for such a claim. We are referred by the brief of defendant to pages 57 and 58 for substantiation of this claim. Upon these pages, together with page 59, is set forth, as a portion of the so-called brief of plaintiff in support of his claim before Mr. Potter, the arbitrator, a statement of his claims against the defendant. On page 59 there is found, it is true, as defendant contends, a deduction of 545.21 yen, which at that time plaintiff admitted was due from himself to his former employer. Even if the character of this so-called brief did not preclude it from coming within the terms of the stipulation entered into between the parties upon the first day of the trial of this case concerning correspondence received by Mr. Burns from Mr. Blake, and even though there were actually in the record in this case testimony to the effect that some time in May of 1919 the plaintiff did admit that at that time he owed the defendant the sum of 545.21 yen, such an admission would be far from admitting that his indebtedness continued down to the time of the trial. In the interval which went by between the arbitration of the case in Tokio and the trial in Shanghai, two things might have happened which would justify the plaintiff in denying that such an obligation still

existed: by that time he might actually have paid the defendant, or he might have come to the conclusion, in the light of subsequent calculations, that he had been wrong at the time of the arbitration in his conclusion that he was indebted to the defendant in such an amount or in any amount at all.

With such shaky support in the record for such a claim, and in view of the entire absence of such a claim from either the answer of the defendant or of the actual testimony adduced by it at the trial of this case, the claim that any deduction should be made upon such a ground is entirely unwarranted.

VII.

THE APPEAL OF THIS CASE SHOULD BE DISMISSED FOR THE REASON THAT NO MOTION FOR A NEW TRIAL WAS MADE IN THE COURT BELOW PRIOR TO TAKING OUT A WRIT OF ERROR.

A glance at the record in this case will show that no motion for a new trial or anything in the nature of such a motion was ever made in the United States Court for China, the trial court. While a motion for a new trial is not a prerequisite to an appeal, using appeal in its broadest sense, as a general rule in jurisdictions where there is no statute or rule of court upon the subject, nevertheless, as will be noted at page 960 of 3 Corpus Juris, in a majority of the jurisdictions of the United States

such a step is made necessary by statute or by the rules. Whether or not, then, such a motion was necessary in this case before an appeal could be perfected depends upon the statutes and court rules in effect in the jurisdiction of the United States Court for China.

In Section II of this brief we have already had occasion to refer to both the statute which provided for the nature of the remedies and procedure to be followed in the old Consular Courts, and the manner in which such remedies and procedure were adopted by the act of Congress which, in 1906, established the United States Court for China. The same reasoning that we followed in Section II of this brief in urging the conclusion that no replication was necessary in this case, may properly be followed in determining that the procedure of the old consular courts is binding upon the United States Court for China at the present time so far as the necessity for a motion for a new trial as a prerequisite for an appeal is concerned.

In this connection the case of United States v. Engelbracht, 1 Ex. Ter. Cases 169, found in Appendix A of this brief, is authority for holding that the existing procedure referred to in the organic act creating the United States Court for China is the old court regulation.

Was, therefore, a motion for a new trial necessary under these court regulations? We submit

that it was. Regulation 41 provides "within five days after judgment the appellant must set forth his reasons by petition filed with the consul, which shall be transmitted as soon as may be to the Minister with a copy of the docket, entries and all papers in the case". The reasons referred to are, of course, the reasons for a new trial. For the word "consul" we must now understand "court" or "clerk", and the evident purpose of the provision is to give the trial court an opportunity to review its judgment and to modify or set aside the same should the grounds in the petition be found to be well taken.

The filing of such a petition has in fact been held a prerequisite in an appeal from the Consular Court to the United States Court for China. (Katz v. Barkovitch, United States Court for China, 1 Ex. Ter. Cases 205, which will be found in Appendix B of this brief.) There is no reason why the rules should not be the same in appeals from the United States Court for China, whose procedure is required to be "in accordance with" that of the Consular Court. Nor is this requirement in any way affected by the provision in paragraph three of the act creating the United States Court for China that "appeals and writs of error shall be regulated by the procedure governing appeals within the United States." Section 41 of the court regulations above quoted is not an attempt to regulate the appeal, but a requirement as to what must be

done before the appeal is taken. In other words, it prescribes a condition precedent, and where the local practice so prescribes the Federal procedure "shall conform" thereto "any rule of court to the contrary notwithstanding" (U. S. Revised Statutes, Section 914).

The requirement of Section 41 is unquestionably a wise one, because a litigant should not be allowed to conceal points from the trial court or withhold mention of errors which have escaped its notice in the hurry and strain of the trial, but which could be speedily corrected if brought to its attention in the mode prescribed by this requirement.

It is obvious, therefore, that the appeal in this case should be dismissed upon the ground that the condition precedent to the taking of the said appeal has not been complied with.

For the reasons and authorities herein before set forth in this brief, we submit that the appeal in this case should be dismissed, and that, in any case, even though this court shall consider the matters urged on this appeal by the defendant below and plaintiff in error here, it should come to the conclusion that all of the six points urged by counsel are either wholly without merit or concern themselves with trivial matters not in any way prejudicial to the

said plaintiff in error, and that, therefore, the judgment of the court below should be affirmed.

Dated, San Francisco,
February 25, 1921.

CHICKERING & GREGORY,
DONALD Y. LAMONT,
JERNIGAN, FESSENDEN & ROSE,
Attorneys for Defendant in Error.

(APPENDIX FOLLOWS.)

Appendix.

APPENDIX A.

In the United States Court for China

UNITED STATES vs. CHARLES A. ENGELBRACHT.

(*Criminal Cause No. 33; filed October 25, 1909.*)

SYLLABUS.

1.—LEGISLATION: *Procedure: The Consular Court Regulation of* 1864, and later, still govern the procedure of American Courts in China except so far as the Judge of this Court has exercised his statutory "authority** to modify and supplement" them.

2.—:—: Such Regulations prevail even over inconsistent acts of Congress not expressly relating to this jurisdiction.

3.—:—: *The limitation of criminal proceedings* prescribed by sec. 82 of said Regulations, and not the shorter one of Rev. Stats. sec. 1044, applies here.

4.—: *Exegesis:* The maxim *Expressio unius est exclusio alterius,* applied.

Arthur Bassett, Esq., U. S. District Attorney, for the prosecution.
F. M. Brooks, Esq., *contra.*

THAYER, J.:

This is a criminal proceeding upon information filed by the District Attorney, which charges that on or about June 2, 1906, in Shanghai, China, the accused, at that time Marshal of the Consular Court for the District of Shanghai, embezzled certain funds which had been paid into said Court and which came into his hands as Marshal.

The accused has filed a plea in bar, alleging that, inasmuch as the action was not instituted within three years after the offense charged was alleged to have been committed, prosecution therefor is barred by the provisions of Section 1044 of the Revised Statutes of the United States, which reads:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment

> is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense barred by the provisions of existing law."

To this plea in bar the District Attorney has filed a replication alleging that said plea is not sufficient because the law providing for the limitation of prosecutions in the jurisdiction of China is defined in Title XV of the Consular Court Regulations for China and not by the provisions of section 1044 of the Revised Statutes.

Section 82 of Title XV of said Consular Court Regulations reads as follows:

> "Heinous offenses, not capital, must be prosecuted within six years; minor offenses within one."

The question presented is, Does the Consular Court Regulation referred to furnish the rule of law for this jurisdiction, notwithstanding the provisions of section 1004 Rev. Stats., with which it conflicts? The question is not one of easy solution. It presents many difficulties by reason of the status of this Court as an extraterritorial one and the necessity thus arising for differentiating it from other United States Courts.

The jurisdiction of all our Federal Courts in the United States is clearly defined and the body of law which those Courts administer can usually be ascertained with little difficulty. This is not equally

true of the extraterritorial courts created by the United States, tho the necessity for their existence, and the authority under which they have been created, has never been questioned. The difficulties arise from the admitted fact that the powers of these tribunals have never been clearly defined.

Sections 4083 to 4130, inclusive, of the Revised Statutes of the United States are a codification of the laws enacted by Congress to define the judicial authority conferred upon Ministers and Consuls in conformity with the provisions of treaties of the United States with China and other countries within which extraterritorial jurisdiction was to be exercised.

Section 4086 specifies the body of law which shall be administered by such Courts and its provisions may briefly be summarized as follows:

(1) The laws of the United States are extended over our citizens in China "so far as they are suitable" to give effect to the treaties with China.

(2) In all cases where such laws are "not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies", the common law, and the law of equity and admiralty, "are extended in like manner over our citizens in China".

(3) If neither the common law, nor the law of equity or admiralty, nor the statutes of the United States, "furnish appropriate and sufficient remedies", the ministers, respectively, shall supply such defects and deficiences by "decrees and regulations which shall have the force of law".

Section 4117 relates to rules of procedure for the Consular Courts and provides that they shall be made by the minister with the advice of the several consuls. It specifies various matters of procedure respecting which the minister shall make rules and concludes with mandatory authority "to make such further decrees and regulations, under the provisions of this Title, as the exigency may demand."

It should be observed that this latter provision relates not only to matters of procedure covered in section 4117, but, as stated, to such further decrees and regulations as the exigency may demand, "under the provisions of this Title, viz: Title XLVII, which includes section 4086, hereinbefore referred to.

Section 4118 provides for the publication of such Regulations, decrees and orders and makes them binding and obligatory until annulled or modified by Congress. Regulation 82, referred to, is one of those thus adopted and it has not been annulled or modified by Congress.

On June 30, 1906, Congress created the United States Court for China. It should first be noted that the jurisdiction of the Consular Court in China, defined by the several statutes above cited, had been exercised for many years prior to the passage of the act organizing this Court. The Act provides that the Consular Courts are still to exercise a limited jurisdiction. This fact, the appellate jurisdiction given to the United States Court for China,

the requirement that the Judge and District Attorney shall be lawyers of good standing and experience, and other manifest reasons, indicate that the general purpose of Congress was to provide a higher and more efficient tribunal than had theretofore existed in China for the exercise of the judicial functions authorized by the treaties.

The act is neither long nor elaborate in its provisions. Section 4 relates to the body of law which shall guide the Court in the exercise of its jurisdiction and provides:

(1) The treaties must be complied with.

(2) The jurisdiction must be exercised in conformity with the laws of the United States in reference to the American Consular Courts in China which were in force at the date of the passage of the Act. This covers such parts of sections 4083 to 4130, inclusive, of the Revised Statutes as are applicable to China and the Regulations, Decrees and Orders which have been promulgated in pursuance thereof which have been given the force of law.[1]

One exception is made, and only one, viz., that sections 4106 and 4107, relating to summons of associates, shall not apply to this Court. The significance of this single exception must be recognized. It can hardly be construed otherwise than as an affirmative confirmation of all the other then existing laws and regulations. The familiar maxim *expressio unius est exclusio alterius* obtains.

1. Secs. 4,086, 4,117 and 4,118.

(3) When "the laws now in force in reference to American Consular Courts in China," are deficient in certain named respects, resort may be had to the common law and the law as established by the decisions of the courts of the United States. The deficiencies here specified differ in language and substance from those described in section 4086 of the Revised Statutes, and must be construed in connection therewith and as additional thereto. There is nothing in section 4 which touches directly the question here presented.

Section 5 relates to the procedure of the court and provides that it shall be "in accordance, so far as practicable, with the existing procedure prescribed for Consular Courts in China in accordance with Revised Statutes of the United States," the judge being given power to modify and suplement the said rules. It is obvious that the particular Revised Statutes to which reference is made are those sections which we have already recited, contained in Title XLVII in pursuance of which the then existing procedure had been adopted. The words "in accordance with" are merely descriptive and not words of limitation.

In other words the procedure of the court which this statute provides is found in the existing Consular Court Regulations. The statute does not state that only such regulations shall be binding as the court may find to have been made in harmony with the Revised Statutes of the United States. It could have done so very easily by the use of appropriate

words. As the statute stands it is not rationally open to any other construction than that announced. The phrase "prescribed for Consular Courts in China in accordance with the Revised Statutes of the United States" is purely and simply descriptive.

All the existing Regulations had been laid before Congress, as required by law, many years before this statute was passed, and it must be presumed, under well established doctrine, that Congress had full knowledge thereof.[2] In fact it appears to the Court that the provision referred to cannot be considered as anything less than an affirmative recognition and confirmation of such of these regulations, at least, as relate to procedure. Whether or not the act must be considered as recognizing and confirming the whole body of these regulations existing at the date of the passage of this act, the Court does not at this time undertake to say. It is proper to note however, that Congress had this opportunity to annul or modify any of these Regulations but did not. Whatever objections may have been theretofore made to these regulations, based on a denial of the constitutional authority of Congress to delegate its legislative powers, it seems clear to the Court that the present action of Congress, in respect to such then existing regulations as relate to procedure of the Consular Courts, operates not only as a confirmation thereof but practically as an enactment of such regulations, exactly

2. Clinton v. Englebrecht, 13 Wall. (U. S.), 446, 20 Law Ed. 659.

the same as if they had been verbally recited in the act itself. However much their origin may be assailed, the regulations adopted under section 4117 are now clearly and unquestionably made binding and obligatory on this Court by direct and specific enactment.

If section 1044 of the Revised Statutes had theretofore any application in the Consular Courts of China, it has no force as a rule of procedure in the United States Court for China, because Congress has provided otherwise in the act creating the Court. Rule 82 of the Consular Court Regulations is made the law of this jurisdiction respecting the limitation of criminal prosecutions.

APPENDIX B.

United States Court for China.

MAURICE KATZ AND MARTIN KATZ, APPELLANTS
v.
H. BARKOVITCH, APPELLEE.

On Appeal from the United States Consular Court at Shanghai.
Civil Action No. 82; Order Dismissing Appeal, June 3, 1910.

Syllabus. Consular Court Regulations of April 23, 1864, Regulations 40 and 41, relating to appeals from Consular Courts, commented upon. Regulation 41, requiring that appellant "must set forth his reasons by petition filed with the consul" "within five days after judgment" is mandatory; and makes the filing of a statement of the grounds of appeal necessary.

Appellant failed to comply with this regulation. His appeal should not have been allowed.

Judgment for appellee with costs.

George F. Curtis, for appellant.

W. S. Fleming, for appellee.

RUFUS H. THAYER, JUDGE:—*Opinion.*

This is a civil action on appeal from a judgment of the Consular Court at Shanghai. Judgment was rendered in said court on May seventh, 1910, against the defendants there in the amount of seven hundred ($700.00) dollars, local currency, with costs.

On May ninth, 1910 (May eighth being Sunday), defendants' counsel filed in the Consular Court a petition for issuance of writ of error out of the United States Court for China, reciting that certain errors had been committed to the prejudice of the defendants, concluding said petition with the statement, "all of which will more in detail appear from the assignment of errors which is filed with this petition". On the same date counsel also filed in the Consular Court a document entitled "Petition for Writ of Appeal". No assignment of

errors or statement of grounds of appeal appears attached to either of these petitions.

On May thirteenth, 1910, security for judgment and costs having been deposited, the trial judge allowed the appeal.

On May twenty-seventh, 1910, the transcript of record was received in the office of the clerk of this court.

Attached to said transcript is a certificate of the clerk of the Consular Court as follows: "I, . . . do hereby certify the foregoing transcript to be a full, true and correct copy of the docket entries in the above entitled cause; and that, except the transcript of the evidence and defendants' exhibit "M", the same together with the exhibits, constitute the transcript of the record herein upon appeal to the United States Court for China. And I do hereby further certify that although thereunto notified so to do, the defendants have failed and neglected to file with this court the stenographer's transcript of the evidence and defendants' exhibit "M", which was withdrawn from the files by the defendants . . ."

The Consular Court Regulations of 1864, Nos. 40 and 41, prescribe the conditions upon which appeals may be made from the Consular Court.

Regulation 40 provides: "40.—*Appeal must be within one day.* Appeals must be claimed before three o'clock in the afternoon of the day after judg-

ment (excluding Sunday); but in civil cases, only upon sufficient security."

Compliance with this rule was made by the appellants. A formal application for appeal was filed in the Consular Court within the time prescribed.

Regulation 41 reads: "41.—*To be perfected within five days.* Within five days after judgment, the appellant must set forth his reasons by petition filed with the consul, which shall be transmitted as soon as may be to the minister, with a copy of docket entries and of all papers in the case."

The provisions that "appellant *must* set forth his reasons" within five days after judgment is mandatory and cannot be construed otherwise than as a requirement that within the time stated the appellant must file in the Consular Court a statement of his *grounds of appeal.*

The appellant having failed to comply with this mandatory rule, it is obvious that the appeal should not have been allowed.

Counsel for the appellee has submitted a motion for the dismissal of this appeal on the ground stated and also on other grounds to which it is unnecessary to refer.

The two regulations referred to constitute all the rules now existing relating to appeals from the Consular Courts. They are simple and easily understood. Moreover, the requirement that an appeal should be accompanied by a statement of

grounds of appeal is in harmony with the procedure obtaining in all American judicial systems. The rule is so plain that a layman could not misunderstand it. The defendants had failed to comply with its simple requirements within the time fixed by the regulation, and thus the right of appeal was lost.

The motion is considered as a motion to docket and dismiss and, for reasons stated, it is granted, and the appeal is dismissed.

An order will be entered requiring appellants to pay into this Court the proper fees and costs and remanding in due order the transcript of record to the Consular Court for further appropriate proceedings in that Court.